CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 518

PACIFIC COAST STEEL COMPANY, PETITIONER,

vs.

JOHN P. McLAUGHLIN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 21, 1932

CERTIORARI GRANTED JANUARY 9, 1933

(37,215)

(37,215)

SUPREME COURT OF THE UNITED STATES

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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Attorneys for Plaintiff and Appellant.

GEORGE J. HATFIELD, United States Attorney, ESTHER B. PHILLIPS, Assistant United States Attorney, Post Office Building, San Francisco, California,

Attorneys for Defendant and Appellee.

DOCKET No. 18,425–L.

TITLE OF CASE.

PACIFIC COAST STEEL CO., a Corporation,

vs.

JOHN P. McLAUGHLIN, etc.

ATTORNEYS.

CLAUDE I. PARKER,

RALPH W. SMITH,

TO RECOVER TAXES.

GEO. J. HATFIELD,

U. S. Atty.

FILINGS, PROCEEDINGS, ETC.

May 13, 1929.	1.	Filed Complaint. Issued Summons.
May 14, 1929.	2.	Filed Summons.
May 24, 1929.	3.	Filed order ex. time to plead.
June 5, 1929.	4.	Filed demurrer and points.

July	1, 1929	Ord. dem. dropped from calendar.
Aug.	12, 1929.	Ord. con. Aug. 19.
Aug.	19, 1929.	Ord. dem. con. to Sept. 16.
Sept.	23, 1929.	Ord. dem. overruled with leave to answer in 10 days.
Oct.	7, 1929.	5. Filed notice of setting cause for trial.
Oct.	10, 1929.	6. Filed Answer.
Oct.	14, 1929.	Ord. trial set Jan. 14, 1930.
Jan.	13, 1929.	7. Filed stip. waiving jury. Ord. trial; ord. leave granted plf. to amend compl't; evidence introduced; mo. for judgm't by both parties; ord. case submitted on briefs–10–10–10 days.
Jan.	22, 1930.	8. Filed pl*fts*. opening brief.
Mar.	20, 1930.	9. Filed outline of brief.
Apr.	12, 1930.	10. Filed pl*fts*. final brief.
Apr.	14, 1930.	11. Filed order allowing deft. to file reply brief.
Apr.	22, 1930.	12. Filed reply brief. Ord. case submitted.
July	27, 1931.	Ord. judgment in favor of def't on findings to be filed.
Aug.	3, 1931.	Lodged findings, etc. Lodged Amendments to findings.
Aug.	5, 1931.	13. Filed findings, etc. Ent'd Judgment for defendant for costs (J. R. 15, p. 493) Made Judgment Roll.
		14. Filed bill of exceptions, etc.

Aug. 6, 1931.	15.	Filed memo. of costs.
	16.	Filed no. of entry of Judgment.
Aug. 18, 1931.	17.	Filed Petition for appeal.
	18.	Filed Order allowing appeal.
	19.	Filed Assignments of Error.
Aug. 19, 1931.	20.	Filed Bond on Appeal. Filed Citation on appeal.
	21.	Filed praecipe on appeal.

[1*]

In the District Court of the United States of America, in and for the Northern District of California, Southern Division.

No. 18,425–L.

PACIFIC COAST STEEL COMPANY, a Corporation,

Plaintiff,

vs.

JOHN P. McLAUGHLIN, United States Collector of Internal Revenue for the First District of California,

Defendant.

COMPLAINT (IN LAW).

(For Recovery of Income and Excess Profits Taxes Illegally Assessed and Collected.)

The plaintiff herein, for cause of action against the defendant, alleges:

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*Page-number appearing at the foot of page of original certified Transcript of Record.

I.

That said plaintiff is now and was during all the times herein mentioned a corporation duly organized, chartered and existing under and by virtue of the laws of the State of California, and during all of the times hereinafter mentioned was a resident and citizen of the State of California, having its principal place of business in the First District of California, in the City and County of San Francisco, State of California, and has at all times borne true allegiance to the Government of the United States of America, and has not in any way aided, abetted or given encouragement to rebellion against the Government, nor at any time aided or abetted in any manner or given comfort to any sovereign or government that is or ever was at war with the United States.

II.

That at all times herein mentioned from and after the 21st day of November, 1921, defendant was the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First District of the State of California, and the [2] person and official to whom the taxes and sums herein sought to be recovered, were paid as hereinafter set forth.

III.

That on or about March 30, 1918, plaintiff duly rendered in accordance with the provisions of law in that regard and the regulations of the Treasury of the United States to the then duly appointed,

qualified and acting Collector of Internal Revenue of the First District of California, its income tax return for the calendar year 1917 by filing same on said day in said First District. That in said return plaintiff corporation stated its taxable income for the calendar year to be $3,093,541.12, and stated its total tax liability for said calendar year to be $1,527,285.98. That at the time of filing said return said plaintiff paid to the then Collector of Internal Revenue of the First District of California the said sum of $1,527,285.98, as and for its income and excess profits tax for the calendar year 1917.

IV.

That the Commissioner of Internal Revenue did on or about the 24th day of June, 1920, forward to said plaintiff corporation a tentative determination of tax deficiency, wherein said plaintiff was advised that an additional claim for tax in the sum of $209,876.47 was asserted by the Commissioner of Internal Revenue by reason of an understatement of the net income of said plaintiff corporation on its said income and excess profits tax returns so filed for the calendar year 1917; that thereafter and within the time required by law, said plaintiff duly filed a protest to said tentative determination letter, which protest was thereafter considered by the said Commissioner of Internal Revenue, who on the 9th day of December, 1922, determined there was due from said plaintiff a deficiency tax of $257,443.30. That thereafter, to wit, on the 9th day of February,

1923, the said deficiency tax for the calendar year 1917 was first assessed and notice and [3] demand for said tax was for the first time on or about the 1st day of April, 1923 duly made of said plaintiff.

V.

That no other agreement, promise, waiver or undertaking of any kind in relation to said tax was at any time made or filed, advanced or offered in the premises by the said plaintiff corporation, save that on December 16, 1922, an unlimited assessment and collection waiver, copy of which is attached hereto, marked Exhibit "A" and by reference made a part hereof, for the tax for said calendar year 1917 was executed and shortly thereafter filed. Thereafter, however, and in February, 1923, the deficiency tax was for the first time placed on the assessment list and no abatement claim or bond was filed by the said plaintiff, nor was any action instituted by the defendant or by the Commissioner of Internal Revenue, or by the Government of the United States to collect a tax prior to December 7, 1925; on this date, the said plaintiff did execute and file an assessment waiver only for the said calendar year 1917, an exact copy of which is hereto attached, marked Exhibit "B" and by reference made a part hereof, which said assessment waiver was thereafter on November 29, 1926, duly extended by another assessment waiver, which gave the United States of America and its officer, the Commissioner of Internal Revenue, the right to reassess the tax

without reviving the Government's right to collect said tax already assessed, until December 31, 1927; exact copy of extension assessment waiver is attached hereto, marked Exhibit "C" and by reference made a part hereof. That thereafter on the 16th day of July, 1927, the defendant issued and delivered a second notice and demand, exact copy therefor attached hereto, marked Exhibit "D" and by reference made a part hereof, by which said defendant claimed a deficiency tax of $103,-111.16, said original deficiency of $257,443.33 having been further reduced in the sum of $38,545.05 for the [4] year 1917, and the sums of $64,702.14 and $47,251.57 for the years 1918 and 1919, respectively, by erroneously crediting such aggregate sum of $111,953.71 against said original deficiency without the consent of the plaintiff nor at his direction, said overpayments of tax appearing on Commissioner's Schedule 26069, of date June 30, 1927. Plaintiff claims no error in crediting the sum of $38,545.05 for the year 1917.

VI.

That said reassessment of tax was made on the erroneous assumption and said overpayment was occasioned by the following errors:

That the said defendant and the Commissioner of Internal Revenue erroneously assumed that the said unlimited assessment and collection waiver filed on or about the 21st day of December, 1923, Plaintiff's Exhibit "A," coupled with the said assessment waiver and extension thereof filed on

or about December 7, 1925 and November 29, 1926, being Plaintiff's Exhibits "B" and "C," extended the Government's right to assess the said income and excess profits tax of said plaintiff corporation at any time prior to December 31, 1927 and prevented the running and tolling of the limitation period provided by Section 250(d) of the Revenue Act of 1918 for the assessment and collection of the said tax, and further erred in crediting overassessments of tax for the years 1913, 1914, 1915, 1916, 1918 and 1919 against the determined deficiency for the year 1917.

VII.

That in order to save itself from having its property seized and levied on under distraint and sold, and further to avoid the imposition of penalties and interest and under compulsion, duress and coercion of the said defendant, the Collector of Internal Revenue in and for the First District of California, evidenced by his letter delivered to the plaintiff, bearing date [5] August 17, 1928, a copy of which is attached hereto, marked Exhibit "E," and by reference made a part hereof, the said plaintiff corporation did on, to wit, the 25th day of August, 1928, in the District aforesaid, pay to said defendant, Collector of Internal Revenue, the sum of $103,111.16 tax, and $26,808.90 interest, or a total sum of $129,920.06 covering said income and excess profits tax for the calendar year 1917 so demanded by the said defendant. Said payment of tax was made under specific protest and at the time of making said payment of

tax plaintiff then and there served formal notice of its written protest upon said defendant, a copy of which protest is attached hereto, marked Exhibit "F" and by reference made a part hereof.

VIII.

That heretofore and on the 23d day of October, 1928, the said plaintiff, Pacific Coast Steel Company, a corporation, duly and regularly filed with said defendant for transmittal to the Commissioner of Internal Revenue of the United States, a Claim for Refund of taxes so paid as income and excess profits taxes erroneously and illegally demanded and collected in the sum of $284,252.20, which said claim for refund duly filed as aforesaid specifically covered the identical allegations and specifications of error set forth by this said complaint and fully advised the said defendant and the Commissioner of the errors herein complained of. That said plaintiff corporation did thereby demand said sum from the said defendant, a true copy of said Claim for Refund being hereto attached, marked Exhibit "G" and by reference made a part hereof. That thereafter the said Commissioner of Internal Revenue of the United States having audited said Claim for Refund did on the 14th day of December, 1928, duly reject said Claim for Refund in its entirety, a true copy of said determination of said Commissioner and letter of rejection is hereto attached, marked Exhibit "H." [6]

IX.

That no other action has been had on said Claim

here sued upon in Congress, or by any department of the Government or in any Court, and plaintiff is the sole owner of said Claim sued upon here, and no person other than plaintiff is the owner of any part thereof or interest therein. That no assignment or transfer of said Claim or any part thereof or interest therein has been made by plaintiff or any other person; that plaintiff is therefore justly entitled to the amount herein claimed from said defendant after allowing all just credits and offsets.

X.

That said defendant has refused to refund or return any part of the said sum of $245,707.15 erroneously and illegally collected as set forth in this complaint, and by reason of the premises the defendant became and is indebteded to the plaintiff in the sum of $245,707.15, together with interest thereon at the rate of six per cent (6%) per annum as provided by law.

WHEREFORE, plaintiff prays for judgment in its favor against defendant in the sum of $245,707.15, together with interest at the rate of six per cent (6%) per annum as provided by law, and for its costs herein expended, and for such other and further relief *as the* Court may seem meet and proper in the premises.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff. [7]

State of California,
City and County of San Francisco,—ss.

E. S. Houdlette, being by me first duly sworn, deposes and says, that he is the vice-president of the Pacific Coast Steel Company, a corporation, plaintiff above named, and as such is authorized to verify the foregoing complaint; that he has read the foregoing complaint, or had the same read to him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

E. S. HOUDLETTE.

Subscribed and sworn to before me this 6th day of May, 1929.

[Seal] W. W. HEALEY,
Notary Public in and for the City and County of San Francisco, State of California. [8]

EXHIBIT "A."

December 16, 1922.

INCOME AND PROFITS TAX WAIVER.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, PACIFIC COAST STEEL COMPANY, of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due

under any return made by or on behalf of the said Corporation, for the years 1911 to 1917, inclusive, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, irrespective of any period of limitations.

PACIFIC COAST STEEL COMPANY,
Taxpayer.

[Seal] By E. M. WILSON, (Sgd.)
President.

_____,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed. [9]

EXHIBIT "B."

(74M)

TREASURY DEPARTMENT

Internal Revenue Service

Form 872A

INCOME AND PROFITS TAX WAIVER FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1922

IT:E:SM

OBB–22907

A–22908

B–22909

Dec. 7, 1925.

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL CO., a taxpayer of Rialto Bldg., San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917, 1918, 1919 and 1920 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is

filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

PACIFIC COAST STEEL COMPANY,
Taxpayer.

(Seal) By E. M. WILSON, (Sgd.)
President.

_____,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed. [10]

EXHIBIT "C."

TREASURY DEPARTMENT
Internal Revenue Service
Form 872A

INCOME AND PROFITS TAX WAIVER
FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1922.

November 29, 1926.

GC:I:II:C1

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL COMPANY, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-

profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

PACIFIC COAST STEEL COMPANY,

Taxpayer.

(Seal) By E. M. WILSON, (Sgd.)

President.

_____,

Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed. [11]

EXHIBIT "D."

INCOME, WAR-PROFITS, AND EXCESS-PROFITS TAX.

Second Notice and Demand for Tax.
Form 1-21-a—Revised Jan., 1920.

UNITED STATES INTERNAL REVENUE SERVICE.

Old Balance	Date	Tax	Amount Paid	Bal. Due	Remarks
$253,609.89	Claim for abatement allowed $38,545.02				
		ITA 26069			Add'l 1917 Income
Credit from 1918 tax—$64,702.14					
" " 1919 "		47,251.57			Feb. 1923—51/3
		Rejected—103,111.16			

Demand is hereby made for the payment of the taxes stated on this notice with a penalty of 5 per cent which has been incurred by failure to pay such taxes within the prescribed time. Beginning on the due date stated below, interest will also accrue at the rate of 1 per cent per month until paid. If payment of the tax, penalty, and interest is not received within ten days, the Act provides that collection with costs shall be made, by seizure and sale of property.

Due Date 2/27/23.

To avoid seizure and sale of property this tax must be paid to Collector of Internal Revenue at San Francisco not later than July 16, 1927.

Collector's
Paid Stamp

To the Collector of Internal Revenue:

I inclose herewith the amount of tax shown above plus penalty of 5 per cent and interest as follows:

Tax $103,111.16
5 Per Cent Penalty Int. 52
mos. @ ½% 26,808.90

Total Tax and Penalties $129,920.06

_____,
Date Signature of Taxpayer.

PACIFIC COAST STEEL COMPANY,
Rialto Building,
San Francisco, Calif.

Feb. 1923—51/3
Return This Form With Remittance. [12]

EXHIBIT "E."

TREASURY DEPARTMENT
Internal Revenue Service
San Francisco, Calif.

August 17, 1928.

Office of the Collector
First District of California

In replying refer to
Field Division—P. B. S.

Pacific Coast Steel Co.,
c/o Mr. H. H. Tooley,
Crocker Bdlg.,
San Francisco, Calif.

Gentlemen:

On July 27, 1928, the Commissioner of Internal Revenue communicated with the undersigned instructing him to collect the tax appearing on the February 1923 list in the amount of $103,111.16 and

stated that if said tax was not paid within thirty days to institute distraint proceedings.

Therefore, it is imperative that the tax be paid by Wednesday, August 22nd, 1928, or distraint proceedings will be instituted and liens filed in the United States District Court.

Respectfully,
JOHN P. McLAUGHLIN, (Sgd.)
Collector.

S:W. [13]

EXHIBIT "F."

August 23, 1928.

Collector of Internal Revenue,
Treasury Department,
Internal Revenue Service,
San Francisco, California.

Dear Sir:

Enclosed herewith you will find check made payable to you in the amount of $129,920.06, additional income and excess profits tax for the calendar year 1917 of $103,111.16, together with interest of $26,808.90.

This payment is not voluntarily made, but to avoid seizure and sale of the corporation's properties and is not an admission of the validity of the tax. On the contrary, it is our opinion that assessment and collection of the tax is barred by the Statute of Limitations and that therefore its collection is illegal.

Respectfully,
PACIFIC COAST STEEL COMPANY.
By E. S. HOUDLETTE, (Sgd.)
Vice-Pres.

Received on behalf of the above this 25th day of August, 1928.

PETER B. SHEEHAN, (Sgd.)
Deputy Collector of Internal Revenue. [14]

EXHIBIT "G."

REASURY DEPARTMENT
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922
IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

(*EXE* SEPARATE FORM FOR EACH TAX PERIOD)

CLAIM FOR

- ☐ Abatement of Tax Assessed
- ☐ Credit Against Outstanding Assessments
- ☒ Refund of Taxes Illegally Collected
- ☐ Refund of Amounts Paid for Stamps Used in Error or Excess

COLLECTOR'S NOTATION
District

Account number

Date received

Stamp here

ate of California,
ty and County of San Francisco, } ss.

Notice to Collector
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit Stamp here

..... Collector of Internal Revenue

PACIFIC COAST STEEL COMPANY
(Name of taxpayer or purchaser of stamps.)

TYPE OR PRINT

Hunter-Dulin Building
(Residence—give street and number as well as city or town and State.)

San Francisco, California
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period Year
From: January 1, 1917
To: December 31, 1917

1. Business in which engaged .....
2. Character of assessment or tax Income and Profits Tax .....
   (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased Tax $257,443.30; Interest $26,808.90 ..... $284,252.20
4. Reduction of Tax Liability requested (Income and Profits Tax) ..... $.....
5. Amount to be abated ..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable) $284,252.20
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) .....
   (If statement covers income tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed 1st California.
9. District in which unpaid assessment appears .....
10. Amount of overpayment claimed as credit ..... $.....
11. Unpaid assessment against which credit is asked; from ..... to ..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

The Pacific Coast Steel Company filed its return for the calendar year 1917 on March 30, 1918. On December 16, 1922, an unlimited assessment and collection waiver for said year was executed, and filed in the Bureau shortly thereafter. This waiver under Mimeograph 3085 (C.B.II – 1, 174) expired on April 1, 1924. In February, 1923, the tax was placed on the assessment list. No abatement claim or bond was filed by the taxpayer, nor was any action instituted by the Collector of the First California district to collect the tax prior to April 1, 1924. The collection of the tax was therefore barred not later than April 1, 1924 under the decision of the U. S. Supreme Court in the case of Bowers v. N. Y. & Albany Lighterage Co., 273 U. S. 346, affirmed 10 Fed. (2d) 1017 and 4 Fed. (2d) 604.

Under date of December 7, 1925, the corporation executed and filed an assessment waiver for the year 1917, which waiver was extended by another waiver executed under date of November 29, 1926. The latter waivers, which gave the Government the right to reassess the tax, but did not by inference or otherwise revive the Government's right to collect a tax already assessed, expired on December 31, 1927. The tax, however, was not reassessed and the Government's rights lapsed completely on said date.

The tax with interest of $26,808.90 was paid on August 25, 1928, under threat by the Collector at San Francisco of distraint proceedings. The taxpayer now demands the refund of $257,443.30 tax

and interest of $26,808.90, as the assessment and collection of the tax was barred by the limiting statutes at the time said collection was made.

See United States of America v. Harry Whyel and George Whyel and Daniel B. Heiner, Collector of Internal Revenue v. Henry Wilhelm Company, in the United States Circuit Court of Appeals for the Third Circuit, wherein it was held that collection of 1917 and 1918 taxes, assessed prior to the enactment of the 1924 Act, were barred under Section 277 (a) (2), Act of 1924, where proceedings were begun more than five years after the returns were filed, the time for beginning such proceedings not being extended by Section 278 (e) (2), Act of 1924.

See also Hood Rubber Co. v. Thomas W. White, Collector, District Court of the United States, District of Massachusetts, particularly the reference therein to the decision of the U. S. Board of Tax Appeals in the appeal of Sunshine Cloak and Suit Co., 10 B. F. A. 971. [15]

EXHIBIT "H."

TREASURY DEPARTMENT,
Washington.

December 1, 1928.

IT:C.
KCC.

Pacific Coast Steel Company,
Hunter-Dulin Building,
San Francisco, California.

Sirs:

Reference is made to your claim for refund

amounting to $284,252.20, representing Federal income and profits tax of $257,443.30 and interest of $26,808.90 alleged to have been overpaid for the year 1917.

The basis of the claim is that the tax was collected after the expiration of the statutory period of limitations on collection and is, therefore, refundable. You rely on the decision rendered by the United States Board of Tax Appeals in the case of the New York and Albany Lighterage Company.

The facts outlined by you are as follows:

Your 1917 return was filed on March 30, 1918. On December 16, 1922, you executed an unlimited assessment and collection waiver which by virtue of Commissioner's Mimeograph 3085, expired April 1, 1924. In February 1923, the tax in question was placed on the assessment list. On December 7, 1925, you executed an assessment waiver which waiver was extended by another assessment waiver dated November 29, 1926. The latter waiver expired December 31, 1927.

The records of the Bureau show that there was assessed in February 1923, an additional tax amounting to $257,443.33. The liability for this tax was satisfied as follows:

Cr.—Schedule 4536 dated February 21, 1923		
1914 overassessment	$729.40	
1915 overassessment	668.21	
1916 overassessment	2,102.99	3,500.60
Cr.—Schedule 4783 dated February 28, 1923		
1913 overassessment		332.81
Abated—Schedule 26069		38,545.05

Credited—Schedule 26069 dated June 30, 1927:		
	64,702.14	
	47,251.57	111,953.71
Paid—August 27, 1928		103,111.16
Total		$257,443.33
Interest paid—August 27, 1928		80,808.90

It is to be noted that the only collections made after April 1, 1924, were the collections made by credit, Schedule 26069, and the collection of tax and interest made on August 27, 1928.

Inasmuch as the period of limitations on assessment as extended by the waivers did not expire until subsequent to the enactment of the Revenue Act of 1926, the case for collection purposes falls within

Pacific Coast Steel Company 2

[16] the scope of Section 278(d) of the Revenue Act of 1926 under which the Commissioner has six years to collect a tax where the assessment was timely. In this connection, your attention is directed to Treasury Decision 4097 and General Counsel Memorandum 4445. Your attention is also directed to the decision rendered by the United States Board of Tax Appeals on June 13, 1928, in the case of the Ginn Coleman Company.

Your claim will, therefore, be rejected in full. The rejection will officially appear in the next schedule to be approved by the Commissioner.

Respectfully,
C. B. ALLEN,
Deputy Commissioner.
By CHARLES P. SUMAY, (Sgd.)
Head of Division.

[Endorsed]: Filed May 13, 1929. [17]

[Title of Court and Cause.]

ANSWER.

The defendant herein answering the complaint alleges:

I.

Admits the allegations of Paragraphs I and II of the complaint.

II.

Denies that the plaintiff duly rendered its income tax return for the year 1917. Admits that the plaintiff rendered its tax return on the date and in the manner and amount alleged in Paragraph III of the complaint.

III.

Answering the allegations of Paragraph IV of the complaint, defendant admits that said deficiency tax for the year 1917 amounting to $257,443.30 was determined on, and was assessed and notice and demand made upon the plaintiff as alleged in Paragraph IV of the complaint. For lack of informa-

tion and belief, defendant denies the remaining allegations of Paragraph IV of the complaint.

IV.

Answering the allegations of Paragraph V of the complaint, defendant denies that Exhibit "C" attached to the [18] complaint is an exact copy of the extension assessment waiver, made on November 29, 1926, and alleges that said Exhibit "C" is not a true copy of said extension assessment waiver. Denies that the credits allowed against said deficiency were erroneous.

V.

Answering the allegations of Paragraph VI of the complaint, denies that said reassessment of tax was erroneous.

VI.

Answering the allegations of Paragraph IX, defendant has no information or belief thereon and because of said lack of information and belief, denies each and every allegation therein. Denies that plaintiff is justly entitled to the amount demanded in the complaint.

VII.

Answering the allegations of Paragraph X, admits that defendant has refused to return or refund any part of the sum referred to. Denies that the same was erroneously and/or illegally collected; denies that defendant is indebted to the plaintiff in said sum or any part of it, together with interest.

Wherefore defendant prays for the complaint to be dismissed.

GEO. J. HATFIELD,
United States Attorney.
ESTHER B. PHILLIPS,
Asst. U. S. Attorney. [19]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Esther B. Phillips, being first duly sworn, deposes and says:

That she is one of the Assistant United States Attorneys for the Northern District of California, one of the attorneys for the defendant in the above-entitled action; that the defendant is temporarily absent from San Francisco and is absent from California; that affiant makes this verification in his behalf for said reasons; that she has read the foregoing answer and knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

ESTHER B. PHILLIPS.

Subscribed and sworn to before me this 30th day of September, 1929.

[Seal] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Exact copy received this 20 day of October, 1929.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attys. for Plaintiff.

Filed Oct. 10, 1929. [20]

[Title of Court and Cause.]

STIPULATION WAIVING JURY TRIAL.

IT IS HEREBY STIPULATED AND AGREED that trial by jury herein is waived and that this case may be tried by the Court sitting without a jury.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff.
GEO. J. HATFIELD,
United States Attorney,
ESTHER B. PHILLIPS,
Asst. United States Attorney,
(Attorneys for Defendant).

Dated: January 13, 1930.

[Endorsed]: Filed Jan. 13, 1930. [21]

[Title of Court and Cause.]

NOTICE OF FILING BILL OF EXCEPTIONS.

To the Defendant, John P. McLaughlin, and His Attorneys:

Please take notice that we have this day filed the

bill of exceptions in the above cause, copy of which is now handed you, and you are further notified that said bill of exceptions will be presented to the above-entitled court for settlement and approval on the 5 day of August, 1931, at 9:30 o'clock, P. M.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff.

Service of above notice and copy of plaintiff's bill of exceptions, referred to therein, acknowledged this 5 day of August, 1931.

GEO. J. HATFIELD,
ESTHER B. PHILLIPS,
Attorneys for Defendant. [22]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

The above-entitled cause came on for hearing before the above-entitled court, sitting without a jury, Honorable Harold Louderback, Judge, presiding, on the 13th day of January, 1930, there being present the plaintiff, by its counsel, Claude I. Parker and Ralph W. Smith, and the defendant, by his counsel, Geo. J. Hatfield, United States Attorney, and Esther B. Phillips, Assistant United States Attorney.

At the trial, it was stipulated by counsel for the respective parties that the allegations of fact contained in plaintiff's complaint were true and correct with the exception that the form of waiver attached

to said complaint as a part thereof, as Exhibit "C," was not a true and correct copy of the waiver. Whereupon defendant introduced in evidence, without objection, a true and correct copy of the waiver which was filed on or about November 29, 1926, with the Commissioner of Internal Revenue, which waiver in form and substance is as follows: [23]

DEFENDANT'S EXHIBIT "A."

"INCOME AND PROFITS TAX WAIVER.

For Taxable Years Ended Prior to January 1, 1922.

CC:I:II:C1

November 29, 1926.

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL COMPANY, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire.

PACIFIC COAST STEEL COMPANY,
Taxpayer.

(Seal) By E. M. WILSON, (Sgd.)
President.

D. H. BLAIR,
CAD.,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

Said waiver was marked Defendant's Exhibit "A."

No further evidence was introduced.

Counsel for plaintiff then moved for judgment for plaintiff, which motion was taken under submission for consideration by the Court. Counsel for defendant moved for judgment for defendant, which motion was likewise taken under submission for consideration by the Court.

Under date of July 27, 1931, the Court rendered its decision and order for judgment for the defendant upon findings of fact and conclusions of law to be filed.

Thereupon defendant filed with the Court his proposed findings of facts and conclusions of law. In due course, plaintiff lodged with the [24] *the* Court its amendments to defendant's proposed findings of facts and also its counter proposed conclusions of law, as follows:

Comes now the plaintiff and respectfully requests this Honorable Court to adopt the following amendments to defendant's proposed findings of fact:

1. That in lieu of Paragraph IV of defendant's proposed findings of fact there be adopted as Paragraph IV of the Court's findings, the following:

IV.

On December 16, 1922, the plaintiff filed with

the then acting Commissioner of Internal Revenue a waiver, a true copy of which was attached to the complaint in this proceeding, marked Exhibit "A," and by this reference is hereby made a part hereof. On December 7, 1925, the plaintiff filed with the then acting Commissioner of Internal Revenue a form of waiver, a true and correct copy of which is attached to the complaint in this proceeding, marked Exhibit "B," and by this reference is hereby made a part hereof. On November 29, 1926, the plaintiff filed with the then acting Commissioner of Internal Revenue a waiver which in form and substance is as follows:

"EXHIBIT 'C.'

INCOME AND PROFITS TAX WAIVER.
For Taxable Years Ended Prior to January 1, 1922.

CC:I:II:C1.

November 29, 1926.

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL COMPANY, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue acts. [25]

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire.

PACIFIC COAST STEEL COMPANY,
Taxpayer.

(Seal) By E. M. WILSON, (Sgd.)
President.

D. H. BLAIR,
CAD.,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer *of* officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

No abatement claim or bond was filed by plaintiff, nor was any agreement or waiver made other than those referred to herein. No proceeding to collect a deficiency tax for 1917 was instituted prior to December 7, 1925, upon which date the plaintiff filed a waiver as hereinbefore referred to.

2. That in lieu of Paragraph V of defendant's proposed findings of fact there be adopted as Paragraph V of the Court's findings, the following:

V.

On or about July 16, 1027, the defendant made in writing a second notice and demand upon the plaintiff, wherein defendant claimed a deficiency tax due from plaintiff amounting to $103,111.16 and interest of $26,808.90, or a total of $129,920.06, upon its tax liability for 1917, said original defi-

ciency of $257,443.33 having been reduced by a credit of $3,500.60, being an overpayment for the years 1914, 1915 and 1916, said credit being made under date of February 21, 1923, and by a credit in the amount of $332.81, being an overpayment of tax for 1913, said credit having been made under date of February 28, 1923; and by an abatement or reduction of the 1917 original deficiency in [26] the amount of $38,545.05; and by credits totaling $111,953.71, being overpayment of tax for the years 1918 and 1919, said credits being made under date of June 30, 1927.

On August 27, 1928, plaintiff paid to the defendant the sum of $103,111.16, and interest in the sum of $26,808.90, to apply against the determined deficiency for 1917. At the time of making said payment the plaintiff served upon the defendant written protest that the payment of said tax was made to avoid seizure and sale of the plaintiff's properties.

COUNTER CONCLUSIONS OF LAW.

Plaintiff further respectfully requests the Court to adopt the following as its conclusion of law from the findings of fact:

I.

That the statutory period within which the Commissioner of Internal Revenue was obliged to make collection of the deficiency in tax proposed against this plaintiff for the year 1917 was not extended by the waivers filed by the plaintiff with the said Commissioner of Internal Revenue under dates of December 7, 1925, and November 29, 1926.

II.

That the payment of $111,953.71 made by the plaintiff on June 30, 1927, against the 1917 deficiency, by virtue of the credit applied on that date against the 1917 deficiency by said Collector of Internal Revenue of overpayments of tax by the plaintiff of its 1918 and 1919 tax liability, in the amount of $111,953.71, was made after the statute of limitations on collections had barred the right of the Commissioner to enforce collection of said 1917 deficiency; and that likewise, payment made by the plaintiff on August 27, 1928, against the 1917 deficiency of $103,111.16, plus interest thereon of $26,808.90, was made after the statute of limitations had barred the right of the Commissioner from enforcing collection of said 1917 deficiency. [27]

III.

That said payments of $111,953.71 and $103,111.16 made by the plaintiff on its 1917 deficiency, together with the interest thereon of $26,808.90, constituted an overpayment by the plaintiff and is refundable.

IV.

That plaintiff recover from defendant the amount of said overpayment, together with interest thereon, as provided by law.

Upon hearing had, counsel for plaintiff moved the Court to adopt its proposed amendments to defendant's proposed findings of fact, and further, to adopt its counter-conclusions of law. The Court thereupon denied said motion, and allowed plaintiff's counsel's exception to be noted on the record.

Thereupon, counsel for defendant moved the Court that it adopt defendant's proposed findings of fact and conclusions of law, which motion was granted by the Court over plaintiff's objections that said conclusions of law were not supported by the findings of fact and were contrary to law. Plaintiff's objections were overruled and plaintiff's exceptions to said ruling were properly allowed and noted.

The foregoing is the substance of all evidence adduced at the trial and of further proceedings had in this cause.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff and Appellant. [28]

ORDER ALLOWING BILL OF EXCEPTIONS.

The foregoing contains the substance of all the stipulations and evidence given on the trial and hearing of this cause, and of further proceedings had, and each of the exceptions stated to have been taken by the counsel for the plaintiff were so taken and were duly allowed and noted by the Court, and, in order that each and every one thereof may be preserved and made of record, this bill of exceptions is duly stated, approved, and signed, and ordered to be made of record in the above-entitled cause this 5 day of August, 1931.

HAROLD LOUDERBACK,
United States District Judge. [29]

[Title of Court and Cause.]

STIPULATION TO BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the foregoing bill of exceptions was presented by plaintiff within the time allowed by law therefor, and that the same is a true and correct statement of the proceedings had at the trial and after trial of the above-entitled action, and that the same may be certified, allowed and settled as provided by law and the practice of the above-entitled court.

Dated this 5 day of August, 1931.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff and Appellant.
GEO. J. HATFIELD,
ESTHER B. PHILLIPS,
Attorneys for Defendant and Appellee.

[Endorsed]: Filed Aug. 5, 1931. [30]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled case came regularly on for trial and hearing on the 13th day of January, 1930, before the above-entitled court, sitting without a jury, Honorable Harold Louderback presiding, a written waiver of jury signed by both parties

having been filed, Ralph W. Smith appearing as attorney for the plaintiff, and Geo. J. Hatfield, United States Attorney, and Esther B. Phillips, Assistant United States Attorney, appearing as attorneys for the defendant, and trial being had, and said cause being submitted to the court for decision, and the court having considered the facts and the arguments of counsel, does now make the following:

FINDINGS OF FACT.

I.

The allegations contained in Paragraphs I and II of the complaint are true.

II.

On or about March 30, 1918, the plaintiff filed its income tax return for the calendar year 1917 with the then duly appointed, qualified and acting Collector of Internal Revenue [31] of the First District of California. In said return, plaintiff stated its income for the calendar year 1917 to be $3,093,541.12, and stated its total tax liability for said calendar year to be $1,527,285.98. At the time of filing said return, plaintiff paid to the then acting Collector of Internal Revenue of the First District of California, the sum of $1,527,285.98 as and for its income and excess profits taxes for the calendar year 1917.

III.

On June 24, 1920, the Commissioner of Internal Revenue forwarded to the plaintiff a tentative determination of tax deficiency in which the plaintiff

was advised that an additional claim for taxes in the sum of $209,876.47 was asserted by the Commissioner of Internal Revenue because of an understatement of the net income of the plaintiff in its said income and excess profits tax return so filed for the calendar year 1917. On December 9, 1922, the Commissioner determined that a deficiency tax was due from the plaintiff for said calendar year, amounting to $257,443.30. On February 9, 1923, a deficiency tax in said amount ($257,443.30) for the calendar year 1917 was assessed, and on or about April 1, 1923, notice and demand for payment of said tax was made of plaintiff.

IV.

On December 16, 1922, the plaintiff entered into a written agreement with the then acting Commissioner of Internal Revenue, whereby the plaintiff consented to a determination, assessment and collection of the amount of income, excess profits, or war profits taxes due under any return made by or on behalf of the plaintiff for the years 1911 to 1917, inclusive, under the Revenue Act of 1921, or under prior income, excess profits or war profits tax acts, or under Section 38 of the Act of August 5, 1909, entitled "An Act to provide Revenue, etc." [32] irrespective of any period of limitations. On December 7, 1925, the plaintiff and the Commissioner entered into a written agreement whereby the plaintiff waived the time prescribed by law for making any assessment of the amount of income, excess profits, or war profits taxes due under

any return made by or on behalf of the plaintiff for the years 1917, 1918, 1919 and 1920, this waiver of the time for making assessment as aforesaid, to remain in effect until December 31, 1926. On November 19, 1926, the plaintiff and the Commissioner of Internal Revenue entered into a written agreement whereby the time prescribed by law for making any assessment of the amount of income, excess profits, or war profits taxes due under any return made by or for the plaintiff for the year 1917 under existing or prior revenue acts was waived, said waiver of the time for making such assessment to remain in effect until December 31, 1927. No abatement claim or bond was filed by plaintiff nor was any agreement or waiver made other than those referred to herein. No proceeding to collect a deficiency tax for 1917 was instituted prior to December 7, 1925.

V.

On or about July 16, 1927, the defendant made in writing a second notice and demand upon the plaintiff, wherein defendant claimed a deficiency tax due from plaintiff amounting to $103,111.16, and $26,808.90, or a total of $129,200.06, upon its tax liability for 1917. In said notice and demand defendant gave notice to plaintiff that certain overpayments for taxes in 1918 and 1919 were allowed as credits upon the deficiency for 1917. On August 27, 1928, plaintiff paid to the defendant the sum of $103,111.16 and interest in the sum of $26,808.90, to apply against the determined deficiency for 1917. At the time of making said payment the

plaintiff served upon the defendant a written protest. Payment of said tax was made to [33] avoid seizure and sale of the plaintiff's properties.

VI.

On October 23, 1928, plaintiff filed with the defendant for transmittal to the Commissioner of Internal Revenue of the United States a claim for refund of taxes so paid as income and excess profits taxes in the sum of $284,252.20, said claim for refund being made upon the grounds and specifications of error set forth in the complaint filed in this suit. The Commissioner of Internal Revenue rejected said claim for refund in its entirety on or about December 14, 1928.

VII.

Plaintiff is the sole owner of the claim sued upon herein, no assignment or transfer of said claim or any part thereof or any interest therein having been made by the plaintiff. No other action has been had on the claim here sued upon either in Congress or by any department of the Government or in any court. The defendant has refused to refund or return any part of the amount in suit.

As its conclusion of law from the foregoing facts the court further finds its

CONCLUSION OF LAW.

That defendant is entitled to a judgment in his favor, together with costs as may be taxed. Let judgment be entered accordingly.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Received copy of within findings this 30th day of July, 1931.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff.

Filed Aug. 5, 1931. [34]

[Title of Court and Cause.]

AMENDMENTS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND COUNTER PROPOSED CONCLUSIONS OF LAW.

Comes now the plaintiff and respectfully requests this Honorable Court to adopt the following amendments to defendant's proposed findings of fact:

1. That in lieu of Paragraph IV of defendant's proposed findings of fact there be adopted as Paragraph IV of the Court's findings, the following:

IV.

On December 16, 1922, the plaintiff filed with the then acting Commissioner of Internal Revenue a waiver, a true copy of which was attached to the complaint in this proceeding, marked Exhibit "A," and by this reference is hereby made a part hereof. On December 7, 1925, the plaintiff filed with the then acting Commissioner of Internal Revenue a form of waiver, a true and correct copy of which is attached to the complaint in this proceeding, marked Exhibit "B," and by this reference is

hereby made a part hereof. On November [35] 29, 1926, the plaintiff filed with the then acting Commissioner of Internal Revenue a waiver which in form and substance is as follows:

"EXHIBIT 'C.'

INCOME AND PROFITS TAX WAIVER.

For Taxable Years Ended Prior to January 1, 1922.

GC:I:II:C.

November 29, 1926.

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL COMPANY, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire.

PACIFIC COAST STEEL COMPANY,
Taxpayer.

(Seal) By E. M. WILSON, (Sgd.)
President.

D. H. BLAIR,
CAD.,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of

the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

No abatement claim or bond was filed by plaintiff, nor was any agreement or waiver made other than those referred to herein. No proceeding to collect a deficiency tax for 1917 was instituted prior to December 7, 1925, upon which date the plaintiff filed a waiver as hereinbefore referred to.

2. That in lieu of Paragraph V of defendant's proposed findings of fact there be adopted as Paragraph V of the Court's findings, the following: [36]

V.

On or about July 16, 1927, the defendant made in writing a second notice and demand upon the plaintiff, wherein defendant claimed a deficiency tax due from plaintiff amounting to $103,111.16 and interest of $26,808.90, or a total of $129,920.06, upon its tax liability for 1917, said original deficiency of $257,443.33 having been reduced by a credit of $3,500.60, being an overpayment for the years 1914, 1915 and 1916, said credit being made under date of February 21, 1923; and by a credit in the amount of $332.81, being an overpayment of tax for 1913, said credit having been made under date of February 28, 1923; and by an abatement or reduction of the 1917 original deficiency in the amount of $38,545.05; and by credits totaling $111,953.71, being overpayment of tax for the years 1918 and 1919, said credits being made under date of June 30, 1927.

On August 27, 1928, plaintiff paid to the defendant the sum of $103,111.16, and interest in the sum of $26,808.90, to apply against the determined deficiency for 1917. At the time of making said payment the plaintiff served upon the defendant written protest that the payment of said tax was made to avoid seizure and sale of the plaintiff's properties.

COUNTER CONCLUSIONS OF LAW.

Plaintiff further respectfully requests the Court to adopt the following as its conclusion of law from the findings of fact:

I.

That the statutory period within which the Commissioner of Internal Revenue was obliged to make collection of the deficiency in tax proposed against this plaintiff for the year 1917 was not extended by the waivers filed by the plaintiff with the said Commissioner of Internal Revenue under dates of December 7, 1925 and November 29, 1926.

II.

That the payment of $111,953.71 made by the plaintiff on June 30, [37] 1927 against the 1917 deficiency, by virtue of the credit applied on that date against the 1917 deficiency by said Collector of Internal Revenue of overpayments of tax by the plaintiff of its 1918 and 1919 tax liability, in the amount of $111,953.71, was made after the statute of limitations on collections had barred the right of the Commissioner to enforce collection of said 1917 deficiency; and that likewise, payment made by the plaintiff on August 27, 1928, against the

1917 deficiency of $103,111.16, plus interest thereon of $26,808.90, was made after the statute of limitations had barred the right of the Commissioner from enforcing collection of said 1917 deficiency.

III.

That said payments of $111,953.71 and $103,111.16 made by the plaintiff on its 1917 deficiency, together with the interest thereon of $26,808.90, constituted an overpayment by the plaintiff and is refundable.

IV.

That plaintiff recover from defendant the amount of said overpayment, together with interest thereon, as provided by law.

_____,

United States District Judge.

[Endorsed]: Service acknowledged this 3d day of August, 1931.

GEO. J. HATFIELD.
By ESTHER B. PHILLIPS,
Asst. U. S. Atty.

Lodged Aug. 3, 1931. [38]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,425–L.

PACIFIC COAST STEEL COMPANY, a Corporation,

Plaintiff,

vs.

JOHN P. McLAUGHLIN, United States Collector of Internal Revenue for the First Collection District of California,

Defendant.

JUDGMENT ON FINDINGS.

This cause having come on regularly for trial on the 13th day of January, 1930, before the Court sitting without a jury, a jury having been waived by written stipulation filed, Ralph W. Smith, Esquire, appearing as attorney for plaintiff, and Esther B. Phillips, Assistant United States Attorney, appearing as attorney for defendant, and the trial having been proceeded with and oral and documentary evidence having been introduced and closed, and the cause having been submitted to the Court for consideration and decision; and the Court after due deliberation having rendered its decision and filed its findings, and ordered that judgment be entered in favor of defendant and for costs in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by

the Court that plaintiff take nothing by this action and that defendant go hereof without day; and that said defendant do have and recover of and from said plaintiff his costs herein expended taxed at $16.00.

Judgment entered this 5th day of August, 1931.

WALTER B. MALING,
Clerk. [39]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now the Pacific Coast Steel Company, appellant herein, and shows that on the 27th day of July, 1931, the above-entitled court rendered its decision pursuant to which judgment in favor of defendant was duly entered on the 5th day of August, 1931, and that in and by said decision and judgment and the proceedings prior thereto certain manifest errors were committed to the prejudice of this appellant, all of which will more fully appear from the assignment of errors filed by the appellant herewith.

WHEREFORE, this appellant prays that an appeal may be allowed in its behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a citation be issued as by law provided commanding the defendant to appear before the said Circuit Court of Appeals; and appellant further prays that an order be made fixing the amount of the cost bond which appellant shall give and furnish upon said appeal, and that a transcript

of the record, proceedings, and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Appellant.

[Endorsed]: Due service by copy admitted Aug. 18, 1931.

GEO. J. HATFIELD,
U. S. Attorney,
By ESTHER B. PHILLIPS,
Asst. U. S. Attorney,
Attys. for Defendant.

Filed Aug. 18, 1931. [40]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the plaintiff, Pacific Coast Steel Company, and files the following assignment of errors upon which it will rely upon its petition for review of the decision and judgment entered by the above-entitled court in the above-entitled cause on the 5th day of August, 1931.

I.

That said Court erred in rendering and entering its decision and judgment in favor of the defendant and appellee, and against plaintiff and appellant,

in that said decision and judgment is contrary to law.

II.

That said Court erred in denying plaintiff's motion for judgment, since under the law plaintiff is entitled to recovery in this action.

III.

That said Court erred in refusing to adopt plaintiff's amendments to defendant's proposed findings of fact since said [41] amendments are in accord with the facts brought out in the trial of this proceeding.

IV.

That said Court erred in refusing to adopt plaintiff's counter conclusions of law since said counter conclusions of law are true conclusions of the law applicable to the issue involved in this proceeding.

V.

That said Court erred in finding that the waivers dated December 7, 1925, and November 29, 1926, constituted valid and effective agreements extending the limitation period within which the Commissioner of Internal Revenue might enforce collection of the 1917 deficiency tax assessed against the plaintiff on February 9, 1923.

VI.

That said Court erred in failing to find as a matter of law that the collection of the unpaid balance of the 1917 deficiency in tax of $215,064.87 (original deficiency of $257,443.33 reduced by an abate-

ment of $38,545.05 and by credits of overpayments of 1913 to 1916 taxes of $3,833.41) was barred by operation of the statute of limitations under Section 250(d) of the Revenue Act of 1921.

VII.

That said Court erred in failing to find as a matter of law that the payment made by the plaintiff of $111,953.71 on June 30, 1927, was an overpayment which is refundable and recoverable in this proceeding.

VIII.

That said Court erred in failing to find as a matter of law that the payments made by the plaintiff of $103,111.16 plus interest thereon of $26,808.90 on August 27, 1928, were overpayments which are refundable and recoverable in this proceeding. [42]

IX.

That even if the waivers extended the period of limitations against collection, the Court erred in failing to find as a matter of law that the collection of the $103,111.16 plus interest of $26,808.90 on August 27, 1928, was unwarranted since the final waiver by its terms extended the period for collection to December 31, 1927, and no later, and said collection on August 27, 1928, was made beyond the time agreed upon as the limitation for collection, and was therefore illegal, and the amount paid at that time is here*f*ore an overpayment properly refundable and recoverable in this action.

WHEREFORE, said plaintiff prays that the judgment of the said District Court be reversed

and said case remanded to said Court with instructions to enter a judgment in favor of the plaintiff herein for the recovery of the overpayment of its income and excess profits taxes for the year 1917 in the amount of $241,873.77 plus interest thereon as provided by law, or to enter such other decree in said cause as in the opinion of the United States Circuit Court of Appeals for the Ninth Circuit is deemed meet and proper.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff.

[Endorsed]: Due service by copy admitted the 18th day of August, 1931.

GEO. J. HATFIELD,
U. S. Atty.,
By ESTHER B. PHILLIPS,
Asst. U. S. Atty.,
Attys. for Defendant.

Filed August 18, 1931. [43]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST BOND.

Messrs. Claude I. Parker and Ralph W. Smith, attorneys for plaintiff and appellant, in the above-entitled cause, having filed herein and presented to the Court plaintiff's petition for appeal (together with its assignment of errors) praying for the allowance of an appeal bringing up for review to the

United States Circuit Court of Appeals for the Ninth Circuit the proceedings, decision and judgment rendered by the Southern Division of the United States District Court for the Northern District of California herein, and praying further for an order fixing the amount of cost bond, and for an order for issue of citation and for transmittal of the record to said United States Circuit Court of Appeals—

IT IS ORDERED that the appeal as prayed for in said petition be, and the same is hereby allowed for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision and judgment of the above-entitled court referred to in said petition, and that the amount of the cost bond to be given by said appellant upon appeal be, and the same is hereby fixed at the sum of Two Hundred and Fifty Dollars ($250.00).

IT IS HEREBY FURTHER ORDERED that a duly authenticated transcript of the record, proceedings, and papers in this cause, [44] be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Due service admitted by copy, August 18, 1931.

GEO. J. HATFIELD,
U. S. Attorney,
By ESTHER B. PHILLIPS,
Attorneys for Defendant.

Filed Aug. 18, 1931. [45]

[Title of Court and Cause.]

THE PREMIUM CHARGE IS $10.00 PER ANNUM.

COMMERCIAL CASUALTY INSURANCE COMPANY.

Bond No. 200,918.

NEWARK, NEW JERSEY.

UNDERTAKING FOR COSTS ON APPEAL.

WHEREAS, in an action in the Southern Division of the United States District Court for the Northern District of California, a judgment was, in the fifth day of August, 1931, rendered by the said Court in favor of the defendant, and against the said plaintiff and appellant, Pacific Coast Steel Company, a corporation, and

WHEREAS, the said plaintiff and appellant is dissatisfied with the said judgment, and is desirous of appealing therefrom to the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, in consideration of the premises, and of such appeal the Commercial Casualty Insurance Company, a corporation, having its principal place of business in the State of New Jersey, duly incorporated under the laws of the State of New Jersey, for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements of the laws of the State of California respecting such

corporations, does hereby undertake in the sum of Two Hundred Fifty and No/100ths Dollars ($250.00), and promise on the part of the appellant that said appellant will pay all damages and costs which may be awarded against it on said appeal or on a dismissal thereof, not exceeding the aforesaid sum of Two Hundred Fifty and No/100ths Dollars ($250.00), to which amount it acknowledges itself bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above-entitled matter may, upon notice to the Commercial Casualty Insurance Company, of not less than ten days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor. [46]

Dated at San Francisco, California, this 17th day of August, A. D. 1931.

COMMERCIAL CASUALTY INSURANCE COMPANY.

By F. W. NEFF. (Sgd.) [Seal]
(F. W. NEFF),
Attorney-in-fact.

Approved this 18th day of August, A. D. 1931.

HAROLD LOUDERBACK,
District Judge.

State of California,
City and County of San Francisco,—ss.

On this 17th day of August, in the year one thousand nine hundred and thirty-one, before me, Emily K. McCorry, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared F. W. Neff, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Commercial Casualty Insurance Company (a Corporation) and acknowledged to me that he subscribed the name of said Commercial Casualty Insurance Company thereto as surety and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] EMILY K. McCORRY,
Notary Public in and for the City and County of San Francisco, California.

My commission expires January 16, 1935.

[Endorsed]: Filed Aug. 19, 1931. [47]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Southern Division of the United States District Court for the Northern District of California:

You will please prepare and within thirty days from the date of issue of the citation on appeal of the above-entitled cause, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit duly authenticated copies of the following documents:

1. All docket entries of proceedings before the court, including all court orders.
2. Pleadings before the court.
3. Findings of fact and conclusions of law.
4. Plaintiff's proposed amendments of findings of fact and counter conclusions of law.
5. Bill of exceptions.
6. Petition for and order allowing appeal, and fixing amount of bond.
7. Assignment of errors.
8. Cost bond.
9. Praecipe for transcript of record.
10. Citation on appeal.
11. Clerk's certificate.

The foregoing to be prepared and duly authenticated, and [48] transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 18, 1931.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff. [49]

[Title of Court and Cause.]

NOTICE OF FILING PRAECIPE.

To GEORGE J. HATFIELD, United States Attorney, and ESTHER B. PHILLIPS, Assistant United States Attorney, Attorneys for Defendant and Appellee:

Please take notice that on the 18 day of August, 1931, we filed with the Clerk of the above-entitled court a praecipe designating the portions of the record to be transmitted to the Circuit Court of Appeals for the Ninth Circuit on the appeal taken in the above cause, a copy of which praecipe is hereto annexed and herewith served upon you.

Dated this 18 day of August, 1931.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff and Appellant,
808 Bank of America Bldg.,
Los Angeles, California.,

Service of the foregoing notice and copy of the praecipe is hereby acknowledged this 18 day of August, 1931.

GEO. J. HATFIELD,
ESTHER B. PHILLIPS,
Attorneys for Defendant and Appellee.

[Endorsed]: Due service by copy admitted this 18th day of August, 1931.

GEO. J. HATFIELD,
U. S. Atty.,
By ESTHER B. PHILLIPS,
Asst. U. S. Atty.,
Attys. for Defendant.

August 19th, 1931. [50]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 50 pages, numbered from 1 to 50, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $10.50; that the said amount was paid by the plaintiff and appellant, and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 27th day of August, 1931.

WALTER B. MALING,
Clerk, United States District Court for the Northern District of California. [51]

[Title of Court and Cause.]

CITATION ON APPEAL.

To JOHN P. McLAUGHLIN, United States Collector of Internal Revenue for the First Collection District of California, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, within thirty (30) days from the date hereof, pursuant to an order allowing appeal, filed in the Clerk's office of the above-entitled court, wherein the Pacific Coast Steel Company is appellant, and you are appellee, to show cause, if any there be, why the decision rendered against the said appellant as in the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

HAROLD LOUDERBACK,
United States District Judge.

Dated August 18th, 1931.

Service of the within citation and receipt of a copy is hereby admitted this —— day of August, 1931.

_____,

_____,

Attorneys for Defendant and Appellee.

Filed Aug. 19, 1931.

Due service by copy admitted this 18th day of August, 1931.

GEO. J. HATFIELD,
U. S. Atty.,
ESTHER B. PHILLIPS,
Assistant U. S. Attny.,
Attnys. for Defendant. [52]

[Endorsed]: No. 6595. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Coast Steel Company, a Corporation, Appellant, vs. John P. McLaughlin, United States Collector of Internal Revenue for the First Collection District of California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 27, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States
Circuit Court of Appeals
For the Ninth Circuit

No. 6595

PACIFIC COAST STEEL COMPANY, a Corporation,

Appellant,

vs.

JOHN P. McLAUGHLIN, United States Collector of Internal Revenue for the First Collection District of California,

Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the twentieth day of January, in the year of our Lord one thousand nine hundred and thirty-two.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable PAUL J. McCORMICK, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. George H. Koster, counsel for appellant, and by Miss Esther B. Phillips, Assistant U. S. Attorney, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel for respective parties to file further briefs 10 x 10.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-second day of August, in the year of our Lord one thousand nine hundred and thirty-two.

Present: The Honorable WILLIAM H. SAWTELLE, Circuit Judge, Presiding; Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court in the above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Before: WILBUR and SAWTELLE, Circuit JJ., and McCORMICK, J.

McCORMICK, District Judge.

A corporate taxpayer, Pacific Coast Steel Company, brought this action at law in the District Court for the Northern District of California for the recovery of income and excess profit taxes for the calendar year of 1917, claiming that said taxes were illegally assessed and collected as deficiency taxes. Pursuant to stipulation, the case was tried by the Court, sitting without a jury, and upon special findings, a judgment was entered for the defendant. The taxpayer has prosecuted this appeal from the judgment, and the sole issue is whether or not collections of taxes on June 30, 1927, and August 27, 1928, respectively, were made after the applicable periods of limitation had barred the right of the Collector to make them.

The pertinent facts found by the Court below are as follows:

On March 30, 1918, plaintiff filed its income and profit tax return for the calendar year, 1917.

On June 24, 1920, the Commissioner of Internal Revenue forwarded to plaintiff a tentative deter-

mination of tax deficiency wherein plaintiff was notified that the Commissioner asserted a claim of $209,876.47, for deficiency taxes because of an understatement by plaintiff in the return of March 30, 1918.

On December 9, 1922, the Commissioner determined that the correct amount of deficiency tax that was due from the plaintiff for said calendar year 1917, was $257,443.30.

On December 16, 1922, plaintiff and the acting Commissioner of Internal Revenue entered into a written agreement whereby the plaintiff consented to a determination, assessment and collection of income, excess profits or war profit taxes due under any return made by or on behalf of it for the years 1911 to 1917, inclusive, under the Revenue Act of 1921 or under prior tax Acts irrespective of any period of limitations.

On February 9, 1923, the deficiency tax of $257,-443.30, was assessed against plaintiff for the calendar year 1917, and, on April 1, 1923, notice and demand for the payment of such deficiency tax was made upon plaintiff but no proceeding to collect a deficiency tax for 1917 was instituted prior to December 7, 1925, when by a written instrument executed by plaintiff and the Commissioner the plaintiff waived until December 31, 1926, the time prescribed by law for making any assessment of the amount of income, excess profits or war profits taxes due under any return made by or on behalf of it for the years 1917 to 1920, inclusive, under

existing or prior Revenue Acts, and again on November 29, 1926, by a similar writing, the plaintiff extended the period of waiver of time for making any assessment of said taxes under any return made by or on behalf of it for the year 1917 under existing or prior Revenue Acts until December 31, 1927.

A second notice and demand was made upon plaintiff on or about July 16, 1927, wherein defendant collector claimed a deficiency tax due from plaintiff in the sum of $129,920.06, upon its tax liability for 1917. In this notice and demand, plaintiff was informed that overpayments by it of taxes in 1918 and 1919, including the amount of $111,953.71, had been on June 30, 1927, credited upon the deficiency tax of 1917.

On August 27, 1928, plaintiff under written protest and to avoid seizure and sale of its property paid to the defendant collector $103,111.16, as deficiency taxes due and interest in the further sum of $26,808.90, the entire amount of $129,920.06, to apply against the determined deficiency taxes due from the plaintiff for the calendar year 1917. On October 23, 1928, plaintiff filed with the defendant collector for transmittal to the Commissioner of Internal Revenue, a demand and claim of refund for taxes so paid as income and excess profits taxes and interest thereon in the aggregate sum of $284,-252.20 upon the ground that the assessment and the collection of such taxes was illegal and barred by the statutes of limitations. The Commissioner on December 14, 1928, rejected entirely said claim for

refund, refused to return any part of said sum of money, and plaintiff thereupon brought this action.

When plaintiff filed its income tax return on March 30, 1918, the time within which the amounts of any tax due thereunder could be assessed or collected was controlled by Section 250 (d) of the Revenue Act of 1918, Chap. 18, 40 Stat. at L., 1057, 1083, which as far as applicable to this appeal reads:

> "Section 250 (d). Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or made and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made * * *."

When the assessment of February 9, 1923, involved in this appeal, was made and applicable to it, there was in effect the Revenue Act of 1921, 42 Stat. at L., 227, 265. Section 250 (d) thereof as far as it is applicable here, reads:

> "The amount of income, excess profits or war profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under

> prior income, excess profits or war profits tax acts * * * shall be determined and assessed within five years after the return was filed unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income excess profits, or war profits tax Acts * * * shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act, * * *."

It is conceded by appellant that the assessment of the additional tax of $257,443.30 having been made February 9, 1923, was timely, and no question is raised by the taxpayer on the claims for refund or in the pleadings in the Court below, and none is urged here, against the regularity or validity of this assessment.

Moreover, notwithstanding the waiver was according to its terms unlimited in time, it is indisputable that under the decisions of the Supreme Court in Aiken v. Burnet, 282 U. S., 279, and Stange v. U. S., 282 U. S., 270, and pursuant to regulations of the Commissioner of Internal Revenue promulgated April 11, 1923, Mim. 3085, I. R. Cum. Bull. II-1, p. 174, the voluntary waiver dated December 16, 1922, extended the time for both assessment and collection of the 1917 taxes only to

April 1, 1924. This was because a departmental ruling terminated all such waivers April 1, 1924.

The appellant contends, however, that the Court below erred in holding that the second waiver—the one executed on December 7, 1925,—operated retroactively to extend the time in which the collection of taxes assessed on February 9, 1923, could be made. In other words, the argument is that because the waiver of December 16, 1922, expired April 1, 1924, all right to subsequently collect the taxes that were validly assessed on February 9, 1923, ceased when the Revenue Act of 1924 became law by reason of the terms of that Act and specifically because of Subdivisions (c), (d) and (e) of Section 278 thereof.

The 1924 Act, 43 Stat. at L., 253, became effective on June 2, 1924. Section 277 (a) thereof, as far as material to this appeal, states:

> "Except as provided in Section 278 and in subdivision (b) of Section 274 and in subdivision (b) of Section 279 (274 and 279 are not involved in this appeal) * * * (2) The amount of income, excess-profits, and war profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended shall be assessed within five years after the return was filed and no proceeding in Court for the collection of such taxes shall be begun after the expiration of period."

Section 278 (c), (d) and (e), respectively, of the Act provide,

"(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

"(d) Where the assessment of the tax is made within the period prescribed in Section 277 or in this section, such tax may be collected by distraint or by a proceeding in Court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in Court for the collection of the tax at any time before the expiration of the period within which an assessment may be made."

"(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in Court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in Court begun, before the enactment of this Act."

The appellant's position concretely stated is that subdivision (e) of Section 278 limits and qualifies subdivision (c) of the same section so as to prevent taxpayers from effectively waiving the benefit of

the statute of limitation in all cases where the right of the Government to collect taxes was barred on the date of the enactment of the Revenue Act of 1924, to-wit, June 2, 1924.

We find no language in subdivision (e) of Section 278 or in any other part of the Act of 1924 that expressly forbids taxpayers from, pursuant to the comprehensive wording of subdivision (c) voluntarily waiving the bar against the collection of validly assessed and unpaid taxes, the collection of which was barred on June 2, 1924. Subdivision (e) merely declares that Section 278 of the 1924 Act shall not authorize the assessment or the collection of such taxes. There being no clear prohibition against taxpayer's voluntary waiver or limitation for collecting taxes that have been timely assessed, it would be straining and amplifying the terms of (e) and unnecessarily restricting the broad and inclusive language of (c) to construe Section 278, as appellant contends. We should not adopt a construction that would require giving to the Statute a meaning not expressed by the language used.

Statutes of limitation barring the collection of taxes that are justly due and unpaid must receive a strict construction in favor of the Government, and limitation in such cases will not be presumed in the absence of clear Congressional action. Loewer Realty Co. v. Anderson, C. C. A. 2, 31 Fed. 2nd, 268.

Moreover, the Supreme Court has held that the right of waiver of statutes of limitation by tax-

payers does not necessarily depend upon statutory authorization. See Stange v. United States, 282 U. S., 270; Aiken v. Burnet, 282 U. S., 280; Florsheim Bros., etc. v. United States, 280 U. S., 453. There is inherent in the taxpayer what may be termed a common law right to waive the benefit of the bar of limitation.

As illustrative of the broad effect that should be given to voluntary waivers of limitation against collections of taxes the Supreme Court has pointedly said in Aiken v. Burnet, supra:

> "It is contended that the waiver of February 5, 1921, is invalid because it was executed prior to the enactment of Section 250 (d) of the Revenue Act of 1921, which was the first of the revenue acts to provide in terms for the giving of waivers. The argument is that prior to the enactment of that section the Commissioner lacked authority to accept waivers of the limitation on the period within which assessment might be made under the Acts of 1916 and 1917. This contention is not sound. The militation periods on assessment could be waived by the taxpayer in the same fashion as other statutes of limitations are waived. No reason appears why the Commissioner could not accept such a waiver prior to the Act of 1921. Although the Government might at that time still have brought suit even though the period for assessment had expired, it was thought desirable to follow the normal and simpler course of

> assessment and collection by distraint proceedings because of the advantages afforded. The Commissioner requested the taxpayer to execute a waiver in cases where prolonged reexamination of the return seemed necessary. If authority was needed for the acceptance of such waivers, it may be found in the general broad administrative provisions of the respective acts. Even after the Act of 1921, a so-called waiver was not a contract. The requirement in Section 250 (d) of that Act that the Commissioner sign the consent was inserted to meet exigencies of administration, and not as a grant of authority to contract waivers."

The obligation of the appellant to pay the 1917 taxes had been actually fixed and determined by a valid assessment made prior to June 2, 1924, the day the Revenue Act of 1924 went into effect, and therefore the waivers under consideration in this appeal are distinguishable from those involved in Uncasville Mfg. Co. v. Commissioner, C. C. A. 2, 56 Fed. 2nd, 893. In the latter case all of the deficiency taxes were assessed for the years in question subsequent to June 2, 1924. Upon that date the time had already expired for assessment for deficiencies for the years involved. Waivers were then given authorizing the Commissioner to assess deficiencies and acting on such waivers, he assessed them. The Circuit Court of Appeals for the Second Circuit in that case construed 278 (e) of the 1924 Revenue Act as confining 278 (c) of the same

act to instances where assessment was not barred on June 2, 1924. In the Uncasville action it thus appears that the obligation to pay, as well as the right of the Government to enforce payment of the deficiency taxes, did not exist on June 2, 1924, while here the tax debt and obligation were fully established and existent at all times since February 9, 1923. All that was accomplished by the waiver of December 7, 1925, was to revive the remedy of collection for a fixed and just debt that was due and undischarged on that date. There was no attempt by the waiver under consideration here to thereby create an indebtedness that did not exist and had not been established at the time of the waiver.

There are many strong intimations in the opinion of Mr. Justice Brandeis in Burnett v. Railway Equipment Co., 282 U. S., 295, that sustain our conclusion that the waiver of December 7, 1925, is valid and effective under Section 278 of the Revenue Act of 1924. In footnote 5 on page 300 of the official report of the Supreme Court decision in the Burnett case relative to a statement in the opinion:

> "We need not determine whether respondent is correct in assuming that section 278 (e) qualified Section 278 (c) in respect to waivers on assessment of taxes barred prior to June 2, 1924."

The following explanation appears:

> "[5]Subdivision (e) cannot be said to qualify every other subdivision in Section 278. Nothing indicates an intention to have it limit the effect

> of Section 278 (a) which permits assessment to be made or suit to be brought at any time in the case of a false or fraudulent return or a failure to file any return. * * * Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers. * * * The decision in Russell v. U. S., 278 U S., 181, involved the interpretation of Subdivision (d) which extended the period of collection without any act on the part of the taxpayer. Subdivision (c) is effective only if the taxpayer voluntarily executed a waiver."

The validity and effect of waivers given by taxpayers subsequent to June 2, 1924, and after the expiration of the period of assessment of deficiency taxes were considered by this Court in California Iron Yards Co. v. Commissioner of Internal Revenue, 47 Fed. 2nd, 514, and Judge Wilbur in the course of the opinion in that case said:

> "The petitioner seeks to review the action of the Board of Tax Appeals in affirming an order of the Commissioner of Internal Revenue fixing a deficiency tax of the petitioner for the years 1918, 1919, and 1920. The principal question in the case involves the validity and effect of a waiver of January 16, 1925. This waiver was signed more than five years after the return made by the petitioner for the year 1919, and it is contended by the petitioner that, inasmuch as this waiver was executed more than five years after return, and there-

fore after the limitation for assessment of the tax for the year 1919, it did not authorize the assessment which was made by the Commissioner on December 16, 1925. As the courts were divided upon that question (see note 1, p. 146, opinion of Supreme Court in Stange v. United States, 51 S. Ct. 145, 75 L. Ed. - -, affirming 68 Ct. Cl. 395, decided November 4, 1929), and, as the matter was then pending before the Supreme Court in that case on certiorari from the Court of Claims, it was suggested that a decision herein be postponed until the decision by the Supreme Court in that case. This decision was rendered January 5, 1931. It is there held in accordance with the contention of the Commissioner in this case that the waiver was effective, notwithstanding that it was executed after the running of the statute of limitations. It follows that a properly executed waiver was effective, notwithstanding the expiration of the period of making the assessment before the execution of the waiver."

A fortiori - - should a properly executed waiver of the bar against collection of a tax that had been timely assessed he held effective and binding.

In Hart Glass v. U. S., 48 Fed. 2nd, 443, the Court of Claims in considering the scope of waivers under 278 (c) of Revenue Acts of 1924 and 1926, said:

"By virtue of Section 278 (c) of the Revenue Acts of 1924 and 1926 * * * the waiver herein,

> although filed after the limitations had run against the assessment of taxes against the plaintiff for the year 1918, revived in the Commissioner authority to make an assessment within the period covered by the waiver."

See also the recent decision of the Court of Claims in McDonnell v. U. S., reported in Prentice-Hall Federal Tax Service on June 16, 1932, 1656, under paragraph 1308, sustaining the validity of voluntary waivers of taxpayers of the benefit of the statute of limitations where such waivers were given after the enactment of the Revenue Act of 1924 in cases where the statutory limitation had expired prior to the effective date of said Act and to the same effect see decisions of the Court of Appeals of the District of Columbia in Portage Bro. v. Burnett, 50 Fed. 2nd, 317, and Consumers Ice Co. v. Burnet, 50 Fed. 2nd, 342.

We are of the opinion that the waiver voluntarily executed by the appellant taxpayer on December 7, 1925, was effective and that it operated to revive the right of the Government to collect the taxes that had been lawfully assessed on February 9, 1923, although at the time this waiver was given and prior to the date the Revenue Act of 1924 became effective, the statute of limitations had run against the remedy of collection. We think this conclusion is in consonance with the decision of the Supreme Court. See Burnet v. Railway Equipment Co., 282 U. S., 298; Stange v. U. S., 282 U.

S., 274; Brown and Sons v. Burnet, 282 U. S., 283; Aiken v. U. S., 282 U. S., 277.

The appellant concedes that if the waiver of December 7, 1925, is effective the collection made by the appellee on June 30, 1927, is valid and does not constitute an overpayment which appellant can recover because the waiver of December 7, by its terms, ran to December 31, 1926, and the third waiver, that of November 29, 1926, extended the time for collection beyond June 30, 1927, to-wit, to December 31, 1927. Our conclusion that the waiver of December 7, 1925, is valid and appellants' concession relative thereto disposes of any necessity of considering Section 1106 (a) of the Revenue Act of 1926 that provided that the bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar remedy, but shall extinguish the liability as well. It should be noted, however, that this Section was by the Revenue Act of 1928 repealed as of February 26, 1926. Section 612, Chap. 852, 45 Stat. at L.

It is finally contended, however, assuming that the waiver of December 7, 1925, is valid for all purposes, that the collection made on August 28, 1928, was unauthorized and illegal. The argument in support of this contention is that because the third and last waiver had by its own terms expired before this collection was made, all right to collect was terminated on the expiration date of the waiver, notwithstanding the Revenue Act of 1926, which

extended the period for collection to six years after the date of assessment, became effective before the expiration date specified in the waiver. We think this position untenable.

Prior to December 31, 1927 (the expiry date of the last waiver), the Revenue Act of 1926, Chap. 27, 44 Stat. at L., became law. This law became an inextricable part of the waiver. Its terms and provisions must be read into and with the waiver. Section 277 (3) thereof, as far as applicable to this appeal, reads:

> "(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

Section 278 (c), (d) and (e), respectively, of said Act provide:

> "(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."
>
> "(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been

made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

"(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act."

Section 274 (a) is the Section which provides that the Commissioner must give notice to the taxpayer of a deficiency in the tax and within 60 days from such notice the taxpayer may petition the Board of Tax Appeals for a redetermination of the deficiency. This section has no application to this appeal.

When Sections 277 (3) and 278 (c), (d) and (e) of this Act are considered together and in relation to one another and then applied to the facts as found by the Court below, it is clear that the collection of August 28, 1928, was valid and legally authorized.

The assessment of February 9, 1923, was validly made within five years after the return was filed on March 30, 1928, as required by Section 277 (3) and as the three voluntary waivers effectively operated to extend the time for collection of the taxes so assessed to December 31, 1927, it is obvious from the plain and explicit terms of Sections 278 (c), (d) and (e) that were in effect during the period that was specified in the last waiver that the appellee was given the right to enforce this tax liability by collection at any time within six years after the date of the assessment or until February 9, 1929. Subdivision (d) expressly refers to an assessment timely imposed by this title or "by prior act of Congress * * * (whether before or after the enactment of this Act)." And it clearly authorizes collection of taxes made under such an assessment at any time within six years from the assessment.

The terms and provisions of the 1926 Revenue Act respecting the period of limitation upon assessment and collection of taxes are different from those of the Revenue Act of 1924. While Section 278 (d) of both Acts provide a six-year period after the date of assessment for colection of the tax, the

1924 Act in Section 278 (e) thereof provides that Section 278 shall not affect any assessment made before the enacting of the 1924 statute. No such condition is found in the Revenue Act of 1926. To the contrary, this latter statute in 278 (d) thereof expressly made the six-year period for collection applicable to assessments "Before or after the enactment" of the Act. It is clear, therefore, that Russell v. United States, 278 U. S., 181, which held that the six-year period for collection provided for in the 1924 Act did not apply where the assessment was made prior to June 2, 1924 (the effective date of the Revenue Act of 1924), because to make the six-year period applicable to such assessments would "affect" them contrary to the express terms of (e) of Section 278 of the 1924 Act, is not in point.

This Court had before it in Toy v. United States, 45 Fed. 2nd, 1, an analogous situation to the one now under discussion, except that the part of the Revenue Act of 1926 that was considered in the Toy case was Section 311, relating to estate taxes, instead of Section 278, dealing with income and profits taxes, but the limitation and waiver features of both sections are identical. In the Toy case, the estate tax return was filed August 16, 1922, and a suit for collection of this tax was brought November 14, 1927. It was held that the six-year period for collection provided by the Revenue Act of 1926 applied. Appellant seeks to distinguish this case from the one at bar because in the Toy case the

five years for the assessment and collection of the tax did not expire until after the enactment of the 1926 Revenue Act and therefore that Act could extend the limitation period by imposing the six-year period for collection, but we think that the operation of the waivers, under Section 278, whereby the right of collection was extended to a date after the enactment of the 1926 Act, as well as the terms of the 1926 Revenue Act itself, make the principle of the Toy case applicable here.

We have in an earlier part of this opinion mentioned that it has been settled by the Supreme Court in Florsheim Bros. Co. v. U. S., 280 U. S., 466, and in Aiken v. Burnet, supra, that the taxpayers' waivers of the statute of limitation in assessment and collection of taxes are not contracts that limit the power of the Government from enforcing by legislation the payment of taxes beyond the time specified in waivers, and although the appellant couched the terms of the last waiver in a manner specifically providing that "this waiver of the time for making any assessment '(collection)' as aforesaid shall remain in effect until December 31, 1927, and shall then expire," it cannot thereby disable the Government from prolonging the period for collection by Statute enacted while the waiver was in force. The 1926 Revenue Act gave a six-year period for the collection of all assessments, timely assessed and existing at the time the Act went into effect, without excepting those where waivers had been given.

In the Florsheim case, supra, the Supreme Court said:

> "The Government contends that the 'Income and Profits Tax Waivers' executed by the corporations were waivers by them of the statutory period for another year; that while these waivers were still in force and while the corporations' liability was thus still alive, the Revenue Act of 1924 and 1926 were passed, increasing the period for collection to six years after assessment; that these Acts are applicable to the cases at bar; and that, since the collections were made within six years after the assessments, they were timely made. The corporations insist that the 'Waivers were not merely waivers extending the statutory period, but were binding contracts which limited the time in which the Commissioner could assess and collect the taxes; and that no change in the law made after the date of the contracts and enlarging the time for collection can affect their rights. They urge that the 1924 and 1926 Acts did not purport to extend the periods thus limited by contract; and that, if construed as extending such periods, the provisions of these Acts are unconstitutional. They conceded that, in the absence of contract, a legislature may constitutionally lengthen or shorten the period in which a right may be enforced by legal proceedings.

We are of opinion that the contention of the Government must prevail."

The District Court was correct in holding that none of the collections in this case were barred by the Statutes of limitation. The judgment is affirmed.

[Endorsed]: Opinion. Filed Aug. 22, 1932. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6595

PACIFIC COAST STEEL COMPANY, a Corporation,

Appellant,

vs.

JOHN P. McLAUGHLIN, United States Collector of Internal Revenue for the First Collection District of California,

Appellee.

JUDGMENT.

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Judgment. Filed August 22, 1932. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-seven (87) pages, numbered from and including 1 to and including 87, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of November, A. D. 1932.

[Seal] PAUL P. O'BRIEN, Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question of the effect of Section 278 (e) of the Revenue Act of 1924.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.